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No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The National Labor Relations Board ("the Board" or "the NLRB") has filed a Brief in opposition to the Petition for a Writ of Certiorari filed by Bill Johnson's Restaurants, Inc. ("the Restaurant"). Petitioner believes that most of the points made by the Board were fully addressed in the Petition. However, some of the Board's arguments were not specifically or directly confronted in the Petition and do warrant this brief reply.

ARGUMENT

THE BOARD ADVOCATES A LEGAL STANDARD WHICH IS INAPPROPRIATE AND IN CONFLICT WITH SUPREME COURT PRECEDENT.

In Point "1" of its Argument (NLRB Brief, pp. 9-11), the Board contends that the standard which it applied in this case, and

which was affirmed by the Ninth Circuit, has also been approved by three recent cases from three other Circuits: *George A. Angle v. NLRB*, 94 Lab. Cas. (CCH) ¶13,688 (10th Cir. July 16, 1982); *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979). Petitioner submits that these three cases are definitely not "much like the instant case," as the Board argues (Brief, p. 10), but are in fact patently distinguishable from *Bill Johnson's* on one fundamental point.

In each of the three cases relied upon by the Board, an employer had asserted a cause of action against an employee based, according to the specific allegations of the state court complaint, upon the employee's resort to the NLRB. Thus, in *George A. Angle*, the employer's "malicious prosecution action was premised on [the employee's] involvement in the Board's initiation of civil contempt proceedings. . . ." 94 Lab. Cas. (CCH) at 21,748. In *United Credit Bureau*, the employer's civil suit was "factually based upon the employee's filing of unfair labor practice charges with the Board. . . ." 643 F.2d at 1026. And, in *Power Systems*, the employer filed a state court action "alleging that [the employee] had initiated proceedings before the NLRB and OSHA without probable cause and for the purpose of harassment. . . ." 601 F.2d at 938.

The civil suit filed by the Restaurant — in clear contrast to the three cases noted above — was not premised upon any employee's utilization of the NLRB. Instead, the complaint asserted causes of action for mass picketing, trespass, and libel based on conduct engaged in on the streets of Phoenix. See Pet. App. A-6. Thus, the standard applied by the appellate courts in *George A. Angle*, *United Credit Bureau*, and *Power Systems* has no relevance to the instant case. Indeed, prior to this case, neither the NLRB nor any Federal Court of Appeals had ever held an employer's civil suit alleging such causes of action to constitute an unfair labor practice.

The Board's position is that, when an employer's suit against an employee lacks "a reasonable basis," an "improper motive" may be inferred and an unfair labor practice may be found. NLRB Brief, p. 10. But the fallacy in the Board's far-reaching standard is reflected in the agency's citation to the three Circuit decisions discussed above without regard to the critical factual distinction we have noted. Petitioner agrees that a substantial burden is properly placed upon the employer whose civil suit is premised upon employee resort to NLRB procedures. We have no quarrel with application of the "reasonable basis" test in such circumstances. On

the other hand, a *less* substantial burden should exist where — as here — the suit is premised upon conduct *unrelated* to Board proceedings and well within the spectrum of situations historically recognized by this Court as appropriate for state court resolution. *See, e.g., Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing). With respect to that class of lawsuits, no unfair labor practice should be found as long as the suit is not pre-empted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-169, or dependent upon issues then pending before, or submissible to, the Board. The maintainability of the suit under state law, the evaluation of its merits, and the appropriate disposition of well-founded, or unfounded, causes of action should be consigned to the state court. The Board has no authority to determine whether such a suit has a "reasonable basis" because the Board has no interest to protect that will not be properly and adequately protected by the state court.

The NRLB asserts that, in this case, it did have a legitimate independent interest to protect because "the Board's processes had been invoked," and "the subject matter of the suit was . . . 'pending before the Board [and] subject to its jurisdiction.' " NLRB Brief, pp. 13, 14 n.7. This bootstrap argument assumes the issue rather than addresses it. The Board's processes had certainly *not* been invoked as to the issues in the state court suit (mass picketing, trespass, libel); nor were those issues "pending before the Board," until the Board — improperly, we submit — decided to review the merits and motivation of that suit. It is true that a related proceeding — the unfair labor practice complaint that Ruth Helton was discharged for union activity — was then pending before the Board, but that fact did not invalidate the state's substantial interest in controlling matters of local concern. *See Hotel Employees Union, Local 681 v. Anaheim Operating, Inc.*, 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978); *May Department Stores Co. v. Teamsters Union, Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976); *Mooi Roofing Co. v. De Young*, 9 Mich. App. 295, 156 N.W.2d 617 (1967).[1]

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[1] The Board also asserts that the employer overreached in the depositions taken in preparation for its state court preliminary injunction motion because it asked questions relevant to the employees' union activity and to the employer's defense of pending unfair labor practice charges. NLRB Brief, p. 5. Petitioner submits that its questions were relevant to the state court proceeding and thus proper, and further points out that, even if some questions were improper, the appropriate remedy would not be to order withdrawal of the entire suit but rather to issue a cease-and-desist order, or to obtain a district court injunction, directed

The Board made a factual determination in this case that the Restaurant's civil suit "was brought for retaliation and intimidation of employees in their organizational rights" (see Pet. App. A-13), and the Board now contends that its finding does "not warrant review by this Court." NLRB Brief, p. 11. But Petitioner does not ask this Court to review the Board's factual determination. Rather, Petitioner seeks review of the Board's *authority* to make such a determination. Petitioner believes that the Board exceeds its jurisdiction when it inquires into a plaintiff's motivation for filing a civil suit which is not pre-empted by the NLRA nor based upon utilization of the Board. If the power to make such an inquiry were to be sanctioned, then any employee sued by his employer, or an employer sued by a union, or a union sued by an employee, could, merely by filing a charge with the Board, channel the suit into a preferred forum (the NLRB) and cause an examination of the plaintiff's motivation for suit. Since lawsuits are, by their nature, coercive, the plaintiff would be forced to demonstrate untainted motives on risk of having the Board order him to abandon an otherwise meritorious state court action. Simply put, if the conduct of the state court defendant is unprotected, and proven to be tortious, the plaintiff's motivation for suit is wholly irrelevant. An analogous situation occurs when an anti-union employer discharges, for good cause, an employee attempting to organize his company. The employer's desire to rid himself of a union activist does not convert a well-grounded discharge into an unfair labor practice. *See, e.g., M. R. & R. Trucking Co.*, 218 N.L.R.B. 1109, 1109 (1975); *Klate Holt Co.*, 161 N.L.R.B. 1606, 1612 (1966). *See also Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 621 (5th Cir. 1961).

The NLRB argues that its decision does not conflict with *Linn v. United States Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), because the Board did not require the employer to *prove* the allegations of its libel suit but only to demonstrate "a colorable claim." NLRB Brief, pp. 11-12. Yet the emasculation of *Linn* is clearly evident in the Board's definition of "colorable." When the Board argues that a "colorable" libel claim could not be founded upon publication of a leaflet proclaiming that the Restaurant refuses to pay lawful overtime, tolerates improper sexual advances toward

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at the offensive questions only. *See* 29 U.S.C. § 160(j); *Lippincott Industries, Inc. v. NLRB*, 661 F.2d 112 (9th Cir. 1981); *Gulf States Manufacturing, Inc.*, 261 N.L.R.B. No. 119, 1981-82 NLRB Dec. (CCH) ¶18,992 (1982); *Ball Plastics Division*, 257 N.L.R.B. No. 126, 1981-82 NLRB Dec. (CCH) ¶18,319 (1981).

waitresses, and compels employees to use a "filthy restroom. . . with no soap, paper towels or toilet tissue provided" (NLRB Brief, p. 3), then the term "colorable" has indeed been abused. This was not a case in which publication of allegedly defamatory statements was in dispute, or in which evidence was allegedly fabricated;[2] on the contrary, publication of the challenged statements was documented and uncontested. Whether the document was true or false, and whether it was published maliciously, were matters to be resolved, according to *Linn*, by the state court. 383 U.S. at 64-65.

The same argument applies to the Restaurant's cause of action for mass picketing. The Board asserts that the Restaurant "produced no evidence to support" that cause of action (NLRB Brief, p. 12). But the parties do agree that, at times during the three days of demonstrations, there were at least seven adults and two children parading on the sidewalks in front of the Restaurant and periodically crossing the employer's driveway. *Id.*, p. 2. The Board also points out that the "mass picketing alleged in the complaint never materialized." *Id.*, p. 7. But that fact is irrelevant, since the Restaurant was not blessed with clairvoyance at the time it filed suit, and since the state court's issuance of a temporary restraining order was very likely the reason why mass picketing "never materialized." Accordingly, the Board's refusal to perceive a "colorable" basis to the Restaurant's cause of action for mass picketing reflects, again, an unwarranted intrusion into a garden-variety state court suit designed to limit the potential for civil disorder during a labor dispute. *See United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942). *See also Giant Food Markets, Inc. v. NLRB*, 633 F.2d 18, 25 (6th Cir. 1981) (application for state court injunction against protected picketing does not constitute unfair labor practice).

The Board argues that *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is distinguishable because that case depended upon a finding that the state court was not pre-empted by the NLRA, whereas in the present

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[2] *See Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). *See also S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), in which the Board held that a supervisor's $50,000 slander suit against an employee did not constitute an unfair labor practice despite the supervisor's knowledge that the suit was groundless.

case the Board found that the Restaurant's civil suit was an unfair labor practice regardless of whether the state court was technically pre-empted. NLRB Brief, pp. 12-13. By focusing on the pre-emption aspect of *Sears*, the Board has ignored the Court's underlying reasoning and has overlooked the real touchstone of that case: an evaluation of the risk that state regulation would prohibit conduct protected by the NLRA. *See* 436 U.S. at 196 n.25, 203-05. In *Sears*, this Court recognized that there may be circumstances in which some violations of state law (*e.g.*, trespass for organizational purposes) may actually be protected by the NLRA. 436 U.S. at 204. However, the Court also held that allowing state courts to hear and determine trespass suits based on arguably protected picketing would "not create an unacceptable risk of interference" with conduct which the Board might later find to be protected because "trespass is far more likely to be unprotected than protected." *Id.* at 205. Similarly, the Restaurant's civil suit for mass picketing, trespass, and libel did not create "an unacceptable risk of interference" with protected conduct because such activities, if proven, were likely to be unprotected. Furthermore, despite the Board's stated concern that the Restaurant's suit would be punitive, there was little risk that the state court would sustain the complaint in the absence of substantial evidence. Thus, as in *Sears*, there was no reason or statutory basis for barring the Restaurant from seeking a judicial resolution of its dispute with the demonstrators.

CONCLUSION

Based upon the foregoing arguments and authorities, we respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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